AUG 29 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 73-1584

PETER BENSINGER, JOHN J. TWOMEY, WALTER E. DREW, LOUIS O'SHEA, EDWARD KAMBIC,

Petitioners,

VS.

ERNEST BACH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE NOT PRINTED

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Printed by Authority of the State of Illinois

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is contained in an unpublished Order. It is reprinted in the Appendix to this Petition. The order of the United States District Court is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1974. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether a state prisoner has a constitutional right to be present when prison officials open and inspect incoming mail from attorneys.

STATUTE INVOLVED

42 United States Code § 1983

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

Respondent, an inmate of the Illinois State Penitentiary, filed a pro se complaint for relief under 42 U.S.C., § 1983 in the United States District Court for the Northern District of Illinois. He alleged, among other things, that he was denied the right to be present when incoming legal mail addressed to him was being opened and inspected by prison officials. The complaint named as defendants the appropriate prison mail office personnel and other supervisory personnel in the Illinois Department of Corrections. The District Court dismissed the complaint for failure to state a cause of action. On appeal the Court of Appeals reversed and remanded stating "we hold that plaintiff is entitled to be present during the opening of legal mail addressed to him in prison."

REASONS FOR GRANTING THE WRIT

A.

In holding that the inmate has a federally enforceable right to be present when incoming legal mail is opened and inspected, the Court of Appeals for the Seventh Circuit brings itself into conflict with the holdings of other Courts of Appeal. *Sostre* v. *McGinnis,* 442 F. 2d 178 (2nd Cir. 1971), *cert. den.* 405 U.S. 978; *Frye* v. *Henderson,* 474 F. 2nd 1263, (5th Cir. 1973).

Certiorari should be granted to resolve this conflict. Certiorari should be granted particularly to consider this issue which is not squarely presented for decision in *Wolff* v. *McDonnell,* No. 73-679, though closely related to the questions there before the Court.

B.

The holding of the Seventh Circuit is without support in logic or policy.

There is obviously no explicit basis for a constitutional requirement of the inmate's presence at mail inspection. As an administrative technique it raises more problems than it solves.

First, there will be delays in legal mail delivery since the inmate's presence must be secured in order for his legal mail to be processed. Second, the increase in risk to security may be significant. Third, there is the additional risk that when contraband is discovered in the inmate's presence, he will attempt to seize the contraband. He may become violent if the contraband is confiscated in his presence.

Fourth, as a monitor of prison administrative practice, an inmate is not likely to be effective. A malicious inmate (and convicted felons as a group have a high percentage of malicious persons) will claim anything if he feels he might gain some advantage or if his false claim serves to harass prison officials. An inmate is not an impartial arbiter. And, of course, a malicious prison official may well decide that he does not have much to lose from a swearing contest with an inmate.

In sum, the presence of an inmate at mail inspection will do nothing to insure the end to which it is directed. It will cause delay of mail, increased security problems and generate a large number of swearing contests to occupy the time of federal judges.

C.

The Court of Appeals evinced a concern for the confidentiality of inmate-attorney communications and based its decision upon a desire to protect that confidentiality. Apart from the shortcomings of the remedy it imposes, the Court's analysis of the right it seeks to protect is deficient.

Initially, we do not concede that the *reading* of attorney-inmate mail would be unconstitutional. There is no precedent for holding that the attorney-client privilege is mandated by the United States Constitution. See *Felber* v. *Foote*, 321 F. Supp. 85, 87-88 (D. Conn. 1970) (3 judge court). It is difficult in light of *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) to argue that the attorney-client privilege may be implied from some provision of the Constitution. Even if the privilege is implicit in the Constitutional right to assistance of counsel, it would apply only to criminal cases and there would be no prohibi-

tion against the reading of mail from attorneys pertaining to civil cases. See *Evans* v. *Moseley,* 455 F. 2d 1084, 1087 (10th Cir. 1972).[1]

Further, the attorney-client privilege applies solely to communications by the client. There is no privilege for communications by the attorney. And the policy underlying the privilege is recognized as weak. See 8 Wigmore, Evidence, pp. 557-58 (3rd Ed. 1940) (p. 554, McNaughton Rev. 1961) McCormick, Evidence, p. 182 (1954). ("it would be hard to maintain that a privilege . . . would facilitate more than it would obstruct the administration of justice"). See *Branzburg* v. *Hayes,* 408 U.S. 665, 690 n. 29 (1972).

Admittedly, an inmate does have a right to communicate with courts handling his litigation and with attorneys working to overturn his conviction without physical obstruction of that communication. Blatant censorship of legal letters without any relationship to the demands of

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1. Some would claim that the civil right of access to courts implies an attorney-client privilege. The problems with this argument are many. It requires two implied rights, i.e. the implied right to an attorney as part of the civil right of access to courts and from that implied right, an implied right to a privilege. The first implied right flies in the face of refusal to extend the constitutional right of counsel to civil cases. Moreover, the right of access to courts is in fact not dependent upon the right to an attorney. See e.g., Haines v. Kerner, 404 U.S. 19 (1972). Finally, even if an attorney is required it does not follow that an attorney-client privilege is a necessary or desirable part of the attorney-client relationship, particularly in civil cases.

security is a practice not to be countenanced. However, a prison mail regulation which allows unobstructed correspondence on litigation matters between inmates and their appropriate attorneys or the courts, subject only to opening, verification and inspection of the mails by the prison mail officer alone, is more than sufficient to meet any proper constitutional standards."

CONCLUSION

For the foregoing reasons, the petitioner requests that the Petition For A Writ Of Certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ARGUED JANUARY 21, 1974
February 15, 1974
Chicago, Illinois 60604

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 28

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. JOHN S. HASTINGS, Senior Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

ERNEST BACH,

Plaintiff-Appellant,

No. 73-1290

vs.

PEOPLE OF THE STATE OF ILLINOIS, PETER B. BENSINGER, et. al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72-C-2284
William J. Bauer, *Judge.*

ORDER

Plaintiff Ernest Bach brought a civil rights action seeking declaratory and injunction relief along with monetary damages against various state prison officials. In his *pro se* complaint, plaintiff alleges certain irregularities in the handling of his mail while being incarcerated in a state penitentiary. The district granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted. Plaintiff has appealed. We reverse.

The facts as alleged by plaintiff are summarized as follows. In May 1972 plaintiff, after receiving authority from the appropriate prison personnel, wrote two letters "containing very confidential and embarrassing information about family problems" to his mother and father-in-law and his sister-in-law. The letters were not delivered as addressed but rather forwarded to the Chicago law firm of Downs, Haddix and Schwab along with a cover letter from a prison official directing the lawyers to do with them what they thought appropriate. About a month later, during an interview with a member of the law firm, plaintiff learned that his two letters had been misdirected. According to plaintiff the delay caused in the eventual delivery of the letters "nullified any effect they may have had in preventing future trouble and deterioration of an already delicate family relationship." In July 1972 plaintiff desired to send another letter to a Chicago attorney concerning a civil matter. This letter was returned after prison officials had misaddressed the same. After correspondence with various prison and elected officials about these instances, the present action was commenced.

Plaintiff contends that the district court erred in dismissing his complaint. Plaintiff's challenge is predicated upon his alleged deprivation of free expression, redress

of grievances, access to counsel, and confidentiality of his correspondence caused by the prison officials' interference with and misdelivery of his outgoing mail and by his inability to be present during the inspection of his incoming "legal mail."

We must decide whether plaintiff has succeeded in alleging facts which, if proven, would entitle him to relief, taking into consideration the liberal construction which must be given to a prisoner's pro se complaint. We are convinced that plaintiff has alleged facts sufficient to withstand a motion to dismiss.

The district court in dismissing plaintiff's complaint observed that "[i]n order to be actionable under § 1983, more than an isolated instance of failure to protect a prisoner's rights must be alleged." While this might be true as a general proposition, we think it wholly inapplicable here. Plaintiff's complaint alleges more than an occasional mistake or single isolated incident regarding the mishandling of his mail. The allegations reflect that the acts complained of were a continuing form of harrassment by prison officials. Plaintiff clearly states in his complaint that this ". . . is *not* an isolated incident but typical of harrassment given inmates . . ." (Emphasis supplied.) Assuming as we must that plaintiff's allegations are true, this interference with mail as a continuing form of harrassment raises serious questions of infringement of constitutionally protected rights which deserve consideration.

Next we address ourselves to the issue of whether plaintiff's allegation that he was deprived of constitutionally protected rights because he was not allowed to be present during the inspection of his incoming "legal mail." On that we must balance the interest of prison officials in inspecting incoming mail outside the presence of an inmate with the extent to which this practice infringes upon an inmate's constitutionally protected rights.

We note, at the outset, that it is not the opening of mail for inspection that is questioned, but the right of an inmate to be present at that time. It is undisputed that prison officials have a legitimate interest in opening incoming mail for the purpose of checking for weapons, drugs, or other items which might endanger the safety and security of the prison. We know of no valid reason, however, why an inmate should not be present during the inspection of his incoming legal mail.[1] The plaintiff is not asking his mail be forwarded directly to him.

An inmate's need for confidentiality in his communications with attorneys through whom he is attempting to redress his grievances is particularly important. We think that contact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts. *Adams* v. *Carlson*, No. 73-1268 (7th Cir., August 23, 1973). The potential for diluting privacy in communication between attorney and client is particularly acute in the facts before us. The prison officials in inspecting incoming mail outside the presence of an inmate are provided with an opportunity to obtain advanced warning of potential litigation which might involve the prison and more significantly could become privy to stratagems being formulated between attorney and client with regard to pending litigation. Therefore; we hold that plaintiff is entitled to be

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1. The defendants raise the following as potential problems which would arise in the event prisoners were permitted to be present during the inspection of their legal mail: (1) delay in the mail process; (2) increased security rules; and (3) further litigation involving endless credibility conflicts between inmates and prison officials.

present during the opening of legal mail addressed to him in prison. *Smith* v. *Robbins*, 454 F. 2d 696 (1972).[2]

The judgment of the district court dismissing plaintiff's complaint is reversed and the cause remanded for further proceedings.[3]

2. See also the cases collected in *Adams* v. *Carlson*, *supra*, slip op. at 18.

3. We think it appropriate on remand to appoint counsel for *pro se* plaintiff.